GOVERNMENT

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OF

# THE DISTRICT OF COLUMBIA

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### ZONING COMMISSION

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### PUBLIC HEARING

IN THE MATTER OF

THE APPLICATIONS OF:

Case Nos.

33 PATTERSON LTD. PARTNERSHIP, | 16674

JERMAR, L.L.C., and | 16691

WASHINGTON REAL ESTATE INVESTMENT | 16661

TRUST. |

Thursday
March 1, 2001

Hearing Room 220 South 441 4th Street, N.W. Washington, D.C.

The Public Hearing of Case Nos. 16674, 16691 and 16661 by the District of Columbia Zoning Commission convened at 7:00 p.m. in the Office of Zoning Hearing Room at 441 4th Street, Northwest, Washington, D.C., Carol J. Mitten, Chairperson, presiding.

### ZONING COMMISSION MEMBERS PRESENT:

CAROL J. MITTEN	Chairperson
ANTHONY J. HOOD	Vice Chairperson
KWASI HOLMAN	Commissioner
JOHN G. PARSONS	Commissioner

## COMMISSION STAFF PRESENT:

Alberto P. Bastida, Secretary, ZC Gerald Forsburg, Office of Zoning

## OTHER AGENCY STAFF PRESENT:

Andrew Altman, Director, Office of Planning Ellen McCarthy, Deputy Director, Office of Planning Jennifer Steingasser, Office of Planning

### D.C. OFFICE OF CORPORATION COUNSEL:

Alan Bergstein, Esq. Marie Sansone, Esq.

C-O-N-T-E-N-T-S

### P-R-O-C-E-E-D-I-N-G-S

(7:04 p.m.)

CHAIRPERSON MITTEN: This hearing will please come to order. Good evening, ladies and gentlemen. This is a public hearing of the Zoning Commission of the District of Columbia for Thursday, March 1, 2001. My name is Carol Mitten.

Joining me this evening are Vice Chairman Anthony Hood and Commissioner John Parsons. Commissioner Kwasi Holman will be joining us shortly.

Copies of today?s hearing agenda are available to you and are located to my left near the door at the rear. This evening?s hearing is being held to consider the following applications for special exceptions for electronic equipment facilities. BZA Case Nos. 16674, 16691 and 16661. Notice of today?s hearing was published in the D.C. Register on December 29, 2000 and January 19, 2001 and in the Washington Times on December 29, 2000 and January 12, 2001.

BZA Case No. 16661 was originally scheduled for December 18, 2000 and was rescheduled for today.

This hearing will be conducted under the Board of Zoning Adjustment Rules of Procedure. All persons planning to testify, either in favor or in opposition, are to fill out two witness cards. These cards are located on each end of the table in front of us. Upon coming forward to speak to the Commission, please give both cards to the reporter who is

sitting to my right.

The order of procedure for this hearing will be as follows. Preliminary matters, applicant?s case, report and recommendations by the Office of Planning, report and recommendations by other D.C. agencies, report of the Advisory Neighborhood Commission within which the property is located, parties and persons in support, parties and persons in opposition, rebuttal, and closing statement by the applicant.

Cross examination of witnesses is permitted by the applicant or parties. The ANC within which the property is located is automatically a party in the case. The record will be closed at the conclusion of each case except for any material specifically requested by the Commission, and staff will specify at the end of each case exactly what is expected.

The decisions of the Commission are made exclusively on the public hearing record. In order to avoid any appearance to the contrary, the Commission requests that persons present not engage the members of the Commission in conversation. Please turn off all beepers and cell phone at this time so as not to disrupt these proceedings.

The Commission will now consider any preliminary matters. Preliminary matters are those that relate to whether a case should be heard today, such as request for postponement, continuance or withdrawal, or whether proper and adequate notice of the hearing has been given. If you are not prepared

1 to go forward with a case today, or if you believe that the Commission should not proceed, now is the time to raise such a 2 3 matter. Does the staff have any preliminary matters? 4 5 SECRETARY BASTIDA: Yes, Madam Chairperson. The staff has two preliminary matters. One is generic to the three 6 7 cases, this office had not received the affidavit of posting for any of the three cases. And the second preliminary matter 8 9 is that there is questions about the ability of the Commission 10 to go forward in Case 16661 and perhaps you might want to 11 address that as a preliminary matter. CHAIRPERSON MITTEN: All right. Can we deal with 12 13 the first issue first, which is -- I?ve never encountered that so far in my tenure on the Commission, so what?s the typical 14 15 way of proceeding when the affidavit of posting hasn?t been 16 received? SECRETARY BASTIDA: The affidavit of posting can 17 be received now, the applicant can attest to it, and we can 18 rely on their veracity of what they are stating. And there are 19 20 previous cases in which that has been the case. CHAIRPERSON MITTEN: All right. Shall we do that 21 now or shall we do that at the commencement --2.2 SECRETARY BASTIDA: You can do it for every case, 23 but I just wanted to put everybody on notice that I have that 24

problem with the three cases.

1 CHAIRPERSON MITTEN: Okay. Then let?s do them 2 now in case we can?t proceed. Mr. Gell? Is Mr. Gell here? 3 4 MR. GELL: Yes. 5 SECRETARY BASTIDA: Just identify yourself for the record, please. 6 7 MR. GELL: I?m Stephen Gell, I?m attorney for the 8 applicant. I brought the affidavit down here on Monday. I?m 9 sorry it didn?t get into the file but I did file it. If I look 10 in my file I?ll probably see a copy with the stamped number on it. And I did the posting myself, so I can also attest to the 11 fact that it was done. But that was done on Monday. 12 13 CHAIRPERSON MITTEN: Okay. Very good. Thank Is Ms. Prince here for the folks -- would you care to 14 you. 15 step in, please? Would you ask her to come in, please? 16 Ms. Prince, we have a question regarding the affidavit of posting. Apparently, it wasn?t received, in both 17 the Edgewood Street and the South Capitol Street cases. 18 you address that for us? 19 20 MS. PRINCE: I have an affidavit of posting with me tonight for the 705-707 Edgewood Street case that has been 21 22 The 1501 South Capitol Street was a properly posted. postponement to a date certain and a reposting is not required. 23 24 25 CHAIRPERSON MITTEN: Mr. Bastida, were you

1	saying that we didn?t have the affidavit of posting from the
2	original?
3	MS. PRINCE: Oh, it was posted in connection with
4	the original hearing. I can provide a copy for the record.
5	SECRETARY BASTIDA: Excuse me, Madam Chairperson,
6	but wasn?t a reposting required?
7	MS. PRINCE: Reposting is not required in the
8	event of a postponement. All parties that were interested in
9	the case were at the hearing on the 18th.
10	SECRETARY BASTIDA: Okay, so under the BZA rules,
11	reposting is not required?
12	MS. PRINCE: Reposting is not required.
13	SECRETARY BASTIDA: Okay, thank you. I stand
14	corrected.
15	MS. PRINCE: Thank you.
16	CHAIRPERSON MITTEN: Thank you. And then we
17	have the additional issue related to the South Capitol Street
18	case regarding, I guess as a shorthand way of referring to it,
19	the applicability of the set down rule, in which zoning is
20	actually in place for that property.
21	Mr. Feola, are you going to address that issue
22	for us?
23	MR. FEOLA: If you like, yes.
24	CHAIRPERSON MITTEN: Okay.
25	MR. FEOLA: Apparently you like.

CHAIRPERSON MITTEN: I would like.

MR. FEOLA: For the record my name is Phil Feola with Shaw Pittman, here on behalf of the Washington Real Estate Investment Trust.

We have submitted a supplemental statement that goes through a whole series of things why we think that the case should be heard tonight. I?d like to simplify it for the Commission?s review in the next few minutes.

We really think there?s three critical pieces here that the Commission should take into consideration as it looks at this. The first is that if the Commission accepts the Office of Planning?s position on this, that the property is effectively BPCR because of a case that was set down for a public hearing almost five years ago, we think the Commission would exceed its authority to zone a piece of property without going through the proper channels.

Essentially, what you?re saying is that for the last five years this property is zoned BPCR and, as the Commission knows, you can?t change the zone until you?ve had a public hearing, which has happened in this case although the record?s still open so the hearing?s technically not closed. You have to make a decision, which this Commission hasn?t done. You have to refer the proposed change to the National Capital Planning Commission, which hasn?t happened. It has to come back here, be published as a proposed rule making and then wait

30 days and published as a final rule making.

So there?s a whole process involved in changing the zoning regulations in the District of Columbia. And we think that the existing vesting rule wasn?t intended to extend the authority of this Commission for five years without it making a decision on a case. In fact, it was really put in place to catch kind of last minute permit applications that were trying to slide in under the wire before this Commission had a chance to act on a case that was pending before it.

And, in fact, reading from Zoning Commission Order 636, which is one of the vesting rules, there were a series of them the limitation, and I quote, ?The limitation on the vesting use rights would protect the public interest against last minute? -- that?s the Commission?s words -- ?establishment of a use that would become non-conforming upon the adoption of amendments to the zoning map that are pending when the use is established.?

Well, I don?t think anybody in this room would suggest that this is a last minute application for a set down that was made some time in the spring of 1996.

It?s well established in law, D.C. vs. Green, and a whole series of federal administrative law cases, that an administrative body, legislative body, can?t change the law without following the statutory process. And it is our position that if you accept OP?s position in this case, you

would have done that. You would have changed the zoning of Buzzard Point to BPCR without going through the proper steps.

The second major point I would just like to make about the set down rule, and if you look around the room probably only Mr. Parsons and I are old enough to be around at this time was set down. The set down rule was really not intended to freeze an area for all time, and if you look at the five or six Zoning Commission orders on set down, they?re all of the same ilk.

The Zoning Commission was aware of the potential that these things could get stretched out and they didn?t want to do that. In fact, they talked about it was just a way of trying again to freeze the time while this Commission contemplated a rezoning or a change and not let things slide through the crack.

From another Commission order, 516, speaking of the old vesting rules, those provisions so operated even if, in a proceeding that was pending before the Zoning Commission when an application was filed, the Commission was considering a proposed reduction in the permitted size, density or range of uses at the site, and thereafter took timely -- that?s the Commission?s word -- action to reduce the size and density and range of uses, that property could be permitted and go forward.

Again, it?s timely. I would submit that five years later is not a timely change to the way we do business,

the way you do business, in the District of Columbia. And I think, quite frankly, that if you were to follow the OP recommendation, I think a court would slap it down in 30 minutes. I don?t think it stands a chance of being sustained a court.

And I guess our final piece, our final argument, is that as you well are aware, the zoning regulations have to be applied uniformly across the board. And if you accept OP?s rationale that this case can?t be heard because of the set down rule, you would have treated this applicant, the Washington Real Estate Investment Trust, differently than you treated Florida Rock.

The Florida Rock case that came through here as a PUD makes no mention of the set down problem, makes no mention of the BPCR case and, in fact, the order specifically changes the zoning from M to C3-C.

The Zoning Commission doesn?t, and hasn?t in my 20 years here, treated one property differently than the others, and I think if you don?t hear this case, you would have been treating two property owners who are in the Buzzard Point area that would be part of the overlay differently. And I think it violates the equal protection clause and uniformity.

And I guess in a practical matter, I guess we would urge the Commission to hear this case, hear it on the merits and decide it on the merits. It?s an existing building,

in an existing industrial use. It?s not going to go away no matter what the zoning change is because even under the most stringent BPCR regulations, this would be allowed to stay, as a matter of fact there?s a conforming use.

And so that we?re looking for an opportunity to convince the Commission that we can improve the aesthetics, the physical condition of the building, we?re close to having community support, with a conversion to an EEF we think it can be consistent with the comprehensive plan. And given, what we think, is a very shaky legal ground on the part of the Office of Planning?s position in this, I think it would be foolish not to hear the case and decide it on its merits. Thank you.

CHAIRPERSON MITTEN: Thank you, Mr. Feola. Ms. McCarthy, would you like to give the position of the Office of Planning on this?

MS. MCCARTHY: Yes, madam chair. And actually we?re been discussing this with Mr. Bergstein in the Office of Corporation Counsel. I?ll let him handle the legal precedents and those aspects of it, but I think it?s important to point out that while it has been a considerable amount of time, the Buzzard?s Point zoning was introduced in 1996, the hearings were held in 1996 and decision meetings of the Commission, two meetings were held to consider various aspects of it in 1997, essentially all development was dormant in the Buzzard?s Point area during that point in time.

The Florida Rock PD was approved, nothing happened on that site. There?s been basically no development proceedings, so this issue has never come up up until this point in time, and that was part of the lack of urgency that was placed on completing the case. So to argue, well it was only supposed to cover last minute changes and to look at the timeliness issue, I think timely in terms of an area in which nothing is happening and which there?s no pressure for development, it should be seen in that broader context.

But I know, as the Commission is aware, the Office of Planning starting several months ago indicated to the Commission that it wanted to keep moving on the Buzzard?s Point overlay, that it specifically came to the Commission last month and presented a summary of the hearing and the discussion that the Commission had presented at that point in time, indicated that we had led a, I think its \$1.3 million dollar contract for the Anacostia Waterfront initiative that includes taking a look at zoning and other planning considerations.

And we proposed to the Commission that the record be read and that we finally bring that case to closure, to finalize this zoning and then to move to the next stage where we would look at this in a more detailed fashion through the Anacostia Waterfront initiative about whether we needed to make improvements an even go beyond the BP overlay as it had been presently constituted.

1 I think that it?s also important, I mean in 2 effect what we have in this set down is a moratorium to protect 3 against development that is inimical to the Comp Plan and to the planning efforts that have gone on in the past that want to 4 5 see this area developed as a mixed use area. And what we are seeing very recently is a surge 6 7 of development and development interest in the area. prepared a map for you and Ms. Steingasser is prepared to go 8 9 through these developments. And I think what I?11 do is move 10 the map a little closer to you because it came out to be a little smaller scale than we had intended. 11 Why don?t you go through it? 12 13 MS. STEINGASSER: This was prepared by our waterfront planning --14 MR. FEOLA: Madam Chair, are we getting into the 15 I'm not sure where we are. I mean I think Ms. 16 substance? McCarthy?s making our case for us. We waited five years and 17 we?re still doing more studies and we?re not asking to build a 18 building here. We have a building, and we?re allowed to use 19 20 We?re allowed to use it as it is as an automobile repair All we?re asking is to change that use to another 21 garage. 22 industrial use which, by the way, would be permitted under the BPCR proposed change. So I?m not sure --23 CHAIRPERSON MITTEN: Okay, thank you. 24 25 MR. FEOLA: That there?s other development going

Т	on is not necessarily pertinent.
2	CHAIRPERSON MITTEN: I understand. Ms. McCarthy
3	if you would just point to where this property is and then if
4	any of the commissioners have questions we have the list in
5	front of us and we can see the dots on the map, rather than
6	have you go through each of them individually. If you could
7	just point to where this property is.
8	MS. MCCARTHY: I think it?s the dark, square blue
9	building right there.
10	CHAIRPERSON MITTEN: Okay, thank you. And if any
11	of the commissioners have follow up questions, we?ll have ther
12	ask. Is there anything else that you?d like to say?
13	MS. MCCARTHY: Yes. I think in terms of the
14	planning stuff it?s important to point out that this would not
15	have been a matter of right use under CR regulations, since
16	under CR it would count as a telephone switching station and
17	that requires border zoning adjustment approval.
18	But probably in terms of the legal arguments that
19	Mr. Feola is making, the best thing is to ask Mr. Bergstein to
20	comment on them because we have gone over those issues with
21	him.
22	CHAIRPERSON MITTEN: All right. Thank you, Ms.
23	McCarthy, and before we go to Mr. Bergstein, let the record
24	reflect that Mr. Holman has joined us. Mr. Bergstein.

MR. BERGSTEIN: Thank you. I provided, I hope it

was provided to you, a memorandum of legal advice involving this issue, but I?d like to add a couple of things to it. I disagree with Mr. Feola that the Court of Appeals would strike down the set down rule as I believe it has been applied before and I think it?s a fairly clear rule that states that if an application is filed after a set down hearing that would effectuate a map amendment, that application is processed by the zoning administrator in accordance with either the rule as adopted or the most restrictive zoning being proposed.

If a building permit is issued before the final rule is adopted, I think the reason the Court of Appeals would be sympathetic to that rule dates back to the time when the Georgetown Waterfront was being considered, and there is a case before the Court of Appeals in which the Citizens Association of Georgetown attempted to mandamus, that is force the Zoning Commission to have hearings on that case because there was a fear that the Zoning Commission did not act expeditiously the area would be changed so much that the rezoning would be ineffectual.

And although the Court of Appeals denied that petition, it did state, and I would just like to quote from this: It would be difficult to argue against a proposition that since rezoning of the area apparently will eventually I the not distant future, no important construction should take place before the rezoning is accomplished if this is avoidable.

It would be natural to assume that there would be no temporizing and the zoning commission, or perhaps other government officials, would take whatever legal precautions that may be available to prevent this lest well laid plans for the Waterfront lose much of their expectation, or worse, become a futile exercise. And speaking of this it is usually the first hole in the dike that brings the flood.

It was really, I think in response to the invitation of the Court of Appeals that the Zoning Commission created the set down rule. And it really does not amount to a change in rules before formal rule making process is completed, but is really in essence the placement of a modified moratorium.

I believe the Zoning Commission could have promulgated a rule that simply said after a hearing is set down on a proposed map amendment, no building permit applications will be processed. But that?s not what the Zoning Commission did. It simply said that building permits will be processed provided that the uses don?t exceed the most restrictive matter of right zoning being considered at the time.

That not only is consistent with what I think the Court of Appeals? expectation was, what is consistent with past case law concerning the authority of Zoning Commissions to, in essence, maintain the status quo during the pendency of a map amendment proceeding.

I?d just like to quote from one other case which is Spyer v. Marion Barry, which I think is known as the Hurt Home case, but there is a footnote that the Court of Appeals put in the decision, footnote 19, and it was to cite certain propositions. And one of the propositions they cited was municipality -- this is a case called Denaleo v. Cunningham, it?s a New Jersey case from 1971, and the Court of Appeals cited it with approval for the proposition that municipalities should, in the public interest, be afforded an opportunity amend a zoning ordinance and appeal from an adverse decision, steps taken by landowner while such proceedings are pending should not result in the vesting of rights because he quote ?should not be able to thwart the public interest by a bootstrap operation and winning an unseemly race.?

Therefore, a rule which maintains the status quo during the pendency of a map amendment, I don?t believe would violate the administrative procedures act or the charter requirements, and in fact the NCPC reviewed the rule that established that process.

I think where problems might arise is where the process becomes so attenuated that instead of there being a temporary moratorium you have a de facto rule. And I think that the perspective that you look at would be from the perspective of the applicant that?s before you. And the question becomes does the applicant at this point have any rule

say that while you have an application pending, an applicant 2 3 has no vested rights before a permit is issued. Your ability to use your land is somewhat frozen, 4 5 but you have the ability to convince the Zoning Commission to not adopt the rule. And at that point it?s a matter of waiting 6 7 a reasonable period of time for the Zoning Commission to either act to disapprove the rule, in which case there is no longer a 8 9 moratorium in place and the applicant can then go forward with 10 the use under the pre-existing zoning or the zoning has But that?s a matter of discretion for the Zoning 11 changed. Commission. 12 13 So I think the critical question is what is the 14 status of this proceeding? Is there in fact an active, ongoing 15 rule making that the Zoning Commission is considering, that it 16 intends to take action fairly soon on, and that the applicant has an ability to comment on to dissuade the Zoning Commission 17 not to adopt this rule. 18 If there is such a proceeding in place, I think 19 20 that you could continue to apply the set down rule. If there really isn?t anything going on, then 21 22 what has happened is that there is a de facto rule in place that would violate the APA and the charter. 23 CHAIRPERSON MITTEN: Thank you, Mr. Bergstein. 24 25 Now Mr. Feola if you would like to briefly respond.

making proceeding to comment on, because all this rule does is

MR. FEOLA: I don?t think Mr. Bergstein and I are disagreeing. I think we agree, and I guess our position is five years with no end in sight we have a de facto rule in place. And in fact, contrary to what he said, one thing I disagree with, the new vesting rules didn?t happen because of the Georgetown Waterfront, they happened because of the down zoning on Wisconsin Avenue which triggered a whole series of things which was significantly later in time.

And this applicant?s not trying to sneak anything past anyone. We?re here in a public forum to have you evaluate this application and, as I said before, if you would apply the final rule making in the EEF case, it allows our client to provide 25 percent of the property in an EEF mode.

So are you going to send us home tonight so we come back in three months before the BZA for the same relief? I don?t understand what benefit we get by not going forward, deciding the case on the merit. And I do submit that five years is a long time to wait for this Commission to act. And unless you reopen the record for general public comment, the record?s been closed since I think Ms. McCarthy said, some time in 1996, with the exception of further reports from the Office of Planning.

I mean I guess when is enough enough. And all we?re asking is for a fair hearing on the merits, now instead of three months from now before the BZA, when you put in place

permanent EEF regulations. Thank you.

CHAIRPERSON MITTEN: Thank you, Mr. Feola.

MR. BERGSTEIN: Can I just quickly respond? Even if the Zoning Commission doesn?t have hearings, it would still need to propose the rule so that there would be a notice of proposed rule making and the applicant could, through written comments, comment on the rule. Because I don?t believe there has actually been a proposed action taken for a notice of proposed rule making issue.

The second thing on the equal protection issue,

PUD is an entirely different matter. PUD is in fact a map

amendment that is tied to a particular use and actually lapses

if the use itself lapses or is never itself built. So there is

a difference in one case where in fact a map amendment is being

requested and is granted, and in another case where there has

been no map amendment requested and therefore they?re under the

existing rule.

MR. FEOLA: Real quick, Madam Chair, I agree with what Mr. Bergstein said about the proposed rule. I think the difference in the Florida Rock case is this Commission evaluated that PUD and the change in zoning under the end zoning. You went from a six permitted FAR and M, to a six permitted under the PUD. I submit it may have been a different evaluation, I don?t know, I wasn?t involved in the case. If you looked at the underlying zoning in that property as BPCR,

BPW2 or whatever it was, those matter of right commercial envelopes were lower.

You may have asked for more public amenities, more public benefits, I don?t know. Again, I wasn?t involved in that case, but that?s the difference. You treated that applicant and that property as zoning that pre-dated the BP overlay and you?re treating this particular applicant as if the BP overlay is in place. Thank you.

CHAIRPERSON MITTEN: Okay, thank you.

MS. MCCARTHY: Madam chair, I think also what?s important that the use that was being proposed in the Buzzard Point?s case was a use that was a matter of right use on that site. And that under neither of the zoning categories that one could talk about applying in this instance, neither M nor CR, is this a matter of right use.

As to Mr. Feola about well what good would it do to go through the delay and come back in three months as a variance, the point is that had the applicant not self certified, had they gone to the zoning administrator and had this been determined to be CR, they could have simply applied for a variance at that point in time and be before the BZA at this point, or some point close to now, with a case for a variance, but that wasn?t what was done.

CHAIRPERSON MITTEN: All right, thank you. I?d like to hear from the commissioners now your thoughts.

COMMISSIONER PARSONS: Well, I?m not going to try to wade into this legal issue. The mayor has taken an initiative here to study one of the most important land use decisions this city has undertaken in 50 years. What are we going to do with this section of the city?

Eighteen federal agencies have stopped their planning process to support the mayor and go forward with an initiative that?s going to be announced on March 24. And for this Commission to proceed in any way to upset a planning process which extends from the District of Columbia to the Potomac River, including this property, to decide how the future of this area will finally -- finally -- be the jewel of this city, anything that this Commission would do to upset that and set aside the protections we have, this Commission has, with our prior actions, just is irresponsible.

So I don?t understand what Mr. Feola?s asking us, but it seems to me that if we set aside this set down rule to accommodate his client, we have opened another, and I ask Mr. Bergstein what is it, if we accommodate this case that we have done to every other piece of real estate here where essentially everybody involved has frozen their decision making awaiting a major undertaking in this city.

And it seems to me if we accommodate the applicant here tonight, we have set aside a protection that this Commission can afford, but I?m confused, I?ll admit it,

1 and I?m very hesitant to proceed with anything that would upset that. Help me. I don?t get it. 2 3 I?ve read your memo, I?ve heard this but it seems to me if we accommodate this, then every other land owner out 4 5 there has the right to come in here and say, well what you did five years ago is over. 6 7 MR. FEOLA: If you do --CHAIRPERSON MITTEN: Can we --8 9 COMMISSIONER PARSONS: No, I?d rather hear from 10 Mr. Bergstein. 11 MR. BERGSTEIN: Okay. If you do agree with the applicant that at some point, this point, you cannot fairly 12 13 apply the set down rule to this case, that ruling would be as to all cases in the future. In other words, from this point on 14 15 until you do something else with respect to this proposed map 16 amendment, there is no hold in place on that zoning. CB as far as the zoning administrator is concerned. 17 COMMISSIONER PARSONS: Well that was my suspicion 18 19 and that?s why I urge us not to do that. 20 MR. BERGSTEIN: I just want you to understand that that?s the argument, the argument being made by Mr. Feola 21 22 is that at some point this has become a de facto rule, and therefore it would be unfair for you to continue applying that 23 rule without making a final decision, and therefore you can?t 24

apply the rule at this point any more because it?s become a de

1 facto rule. It just has gone on too long. 2 The other argument is that either that the time 3 itself is reasonable and that as far as this applicant is concerned it?s a fairly new application, he has an opportunity 4 5 to comment and to convince you otherwise with respect to the effect of your proposed rule on what the applicant is prepared 6 7 to do. 8 But if you do agree with Mr. Feola and don?t 9 apply the set down rule to this case, it applies to this entire 10 proceeding. 11 COMMISSIONER PARSONS: That was my suspicion and I would urge us not to do that for the reasons I stated. 12 13 Everything else is withholding decision making based on a major 14 planning effort that the mayor and we all have agreed to. 15 CHAIRPERSON MITTEN: Do you have something new to 16 say or just repeat --FEOLA: Well, iust that I 17 MR. think Commission can adopt the BPCR. I mean it?s been heard, you 18 have the record, follow your own statutory rules. 19 Pass the 20 law, pass the law and everybody knows, and that we don?t have to worry about set down vesting. You can change it later if 21 you don?t like it based on these studies. But pass 22 the law. 23 Right now, we?re sort of stuck in limbo and we?re 24

stuck in limbo because we?ve got two pending cases. We?ve got

the pending EEF case and we?ve got the pending Buzzard Point?s case. Our point is at some point pass the law. Tell us what the law is. That?s all.

CHAIRPERSON MITTEN: All right. Mr. Holman.

COMMISSIONER HOLMAN: Yes. I guess I think I understand the legal issues but what I?m trying to understand is your sense of urgency that if in fact this has been pending five years, or however many years, and I certainly know how long the EEF has been pending. What is the harm that you?re trying to get us to understand about trying to see the process through to its conclusion?

MR. FEOLA: Well, I think until December and you may remember better than I, EEFs were permitted in the CM zone.

And we argue whether it?s BPCRP and whatever. And we were processing to get in a position to renovate the building as an EEF. The Commission decided that it wanted to take a look at EEFs, which I think is a good position to take, and so we got in line like everybody else to get our EEF evaluated by you as to whether or not this was going to create too many in an area, whether it was going to affect the pedestrian activity etc., etc., etc.

We sort of got caught by the double whammy of two proposed actions and so we applied. And we applied I think, notwithstanding what Ms. McCarthy said, correctly. We think the zoning is CM, it?s not BPCR, and I think it?s still, I

1 think a court would throw that out in a minute if we went there and said five years later the Zoning Commission?s still sitting 2 around thinking about what to do at Buzzard Point. 3 4 I mean as Mr. Bergstein and I agree again, at 5 some point it?s become the law, and if it has become the law and the court agrees with us, it hasn?t become the law by the 6 7 statutory permitted guidelines. That?s all. 8 So the urgency is the opportunity and 9 confluence of regulations kind of hit each other together. 10 And, again, substantively if you adopt the EEF regulations in some form or another as final regulations, it permits in the 11 BPCR zone, 25 percent of this building to be an EEF. 12 13 So maybe you?ll make that a special exception or something, but in any event, this applicant will be back before 14 15 the BZA in three months with the same application. So I don?t 16 understand from a practical standpoint why not here and now. Here and now and if it doesn?t fit in the kind of vision for 17 Buzzard Point, if we can?t make the case, then you can turn it 18 down. 19 20 COMMISSIONER PARSONS: As I understand it --21 22 MR. FEOLA: Then we don?t have the set down argument to take to court. 23 COMMISSIONER PARSONS: If we agree to do that, 24 25 we?ve put every piece of real estate in this area up for grabs.

2	MR. FEOLA: Well, I disagree with that.
3	COMMISSIONER PARSONS: The rest of the city is
4	waiting for the decision that will come within a year for a
5	plan for this area and we shouldn?t do anything to thwart that.
6	MR. FEOLA: And the zoning will come two years
7	after the plan?
8	COMMISSIONER PARSONS: That?s irrelevant to me. I
9	mean this is major decision making in this city and anything we
10	would do to thwart the public interest of the Anacostia
11	Waterfront, both sides of this river, by saying that the
12	protections we have afforded here are no longer valid, is
13	irresponsible in my judgment.
14	And go back to the BZA and have the hearing over
15	there I guess is what I would I say.
16	MR. FEOLA: Well but you are acting as the BZA.
17	That?s the dilemma here. And this is a BZA application.
18	COMMISSIONER PARSONS: Well I?m not sure I
19	but it?s wrong. It?s absolutely wrong to proceed with this. It
20	just is.
21	COMMISSIONER HOOD: Madam chair, I am listening
22	to the conversations and I?m glad that Mr. Parsons added his
23	piece. Mr. Feola, I understand your argument but in this city
24	I?ve witnessed the cart always being out there before the
25	horse. This Buzzard Point issue has been on the table for a

1

And I have no patience for that.

1 while, yes, I understand that. 2 But where you lost me and where you lost me going 3 ahead with this is when you said, and I can tell you right now I?m not in favor of moving forward, was when you mentioned that 4 5 you had to come back in three months after we deal with it. I don?t think three months is that much a 6 7 significant of time to have to wait. I really don?t. 8 take care of our business first, which we are in the process of 9 doing, come back at the appropriate time when the cart is not 10 out there before the horse. That?s the way I view this whole issue. 11 Again, I don?t know whether you noticed it or not 12 13 but I?ve noticed it, there?s a big planning effort going on in this city. Things change. Times have changed. 14 15 MR. FEOLA: My response to that, Mr. Hood, is If it were only three months, if you can 16 you?re right. quarantee three months. 17 COMMISSIONER HOOD: No, you said three months. I 18 didn?t say any months, I just used the same time that you did. 19 20 MR. FEOLA: But my point is three months might be four, it might be six. Remember, this idea started with my 21 client well before the Zoning Commission imposed a change in 22 the EEF regulations. 23 COMMISSIONER HOOD: There were none. 24 25 There were none, right. It was a

matter of right use.

COMMISSIONER HOOD: I don?t know if you live in the District or not and I?m not going to blame the District, but I want to make a point here. My point is it?s time now for the District of Columbia to have some regulations in place so the EEF, that whole concept I was in favor --

MR. FEOLA: I agree. I agree.

COMMISSIONER HOOD: It?s time for that. So, unfortunately, clients and unfortunately those folks had to fall in line, but now this city has a good planning operation for the best interests of those residents that live in the city and do business in the city.

I?m sorry it set some folks back but I think if you go in other jurisdictions they have regulations in place.

MR. FEOLA: I guess my final pitch, my final plea is that this is an existing building. It?s an existing industrial use that whether or not this is in the set down area or not will continue in that use. We?re not asking to add a square foot to this building, we?re not asking to add something to it. We?re asking to change an industrial use from one industrial use to the other. That?s all.

So there?s nothing we can do here to jeopardize Buzzard Point. There?s nothing we?re asking to do to jeopardize Buzzard Point. It?s there. And you can go down there and see the police cars laying all over the place down there. It?s an

1	automobile repair garage on two and a half floors.
2	COMMISSIONER HOOD: For the Metropolitan Police
3	Department?
4	MR. FEOLA: Yes.
5	COMMISSIONER HOOD: I believe that?s that?s
6	not even relevant. Thank you.
7	MR. FEOLA: Okay.
8	CHAIRPERSON MITTEN: I would like to know if
9	there?s anyone here representing ANC-2D who would like to weigh
10	in on this? Any representative from ANC-2D?
11	Come forward please. Please identify yourself for
12	the record. Could you turn on your microphone first?
13	MR. ASSALAAM: Yes, I?m Commissioner Assalaam
14	from single member district 2D-L6 and vice chairman of ANC-2D.
15	
16	MR. SIMON: And I?m Gottlieb Simon, executive
17	director for ANC-2D.
18	CHAIRPERSON MITTEN: I would ask that one of you
19	address what you?ve been hearing.
20	MR. SIMON: Well, the Commission is aware of I
21	suppose two facts. One is the intense planning that is going
22	on for the neighborhood, and we are aware of the intense
23	interest of the applicant to be able to move forward.
24	The Commission hasn?t discussed really the issues
25	that you?re addressing tonight having to do with which zoning

to pull these parts together. 2 CHAIRPERSON MITTEN: So you don?t have a position 3 on the issue of the status of the planning process and whether 4 5 or not the rule making is ongoing or what you?d like to see happen in terms of the use being maintained or the zoning being 6 7 maintained, and possibly a decision on our part that would waive the set down rule so that the old zoning would be 8 9 available to other property owners in this area. 10 And if you don?t have an opinion that?s perfectly 11 fine, I just wanted to give you the opportunity. MR. SIMON: We appreciate that very much. 12 13 think Commissioner Assalaam might individually have opinions on that, but in terms of speaking on behalf of the Commission I 14 15 don?t believe we could do that. 16 CHAIRPERSON MITTEN: All right. Thank you. COMMISSIONER HOLMAN: Well I guess then I won?t 17 have to disclose that I live in that general area because there 18 is no position that?s been taken. In fact I do, but it would 19 20 have no influence on what I would decide tonight. CHAIRPERSON MITTEN: Did you have anything else 21 you?d like to share with the Commission before we move? 2.2 COMMISSIONER HOLMAN: Well, I guess I would say 23 that I?m generally persuaded by the issue of trying to resolve 24 25 once and for all what?s going to happen in the Southwest area,

is in place, so we?re no better off than you are in being able

1	and I?m not persuaded that there?s an emergency that would
2	really require us to take what I perceive from what I?ve heard
3	to be a precedent-setting change to accommodate the applicant.
4	I have long been interested in a timely process
5	and one that takes into account all the issues and concerns of
6	the businesses and residents of an area, but I think that we?re
7	so close to having this issue about the future of Buzzards
8	Points in Southwest resolved that I would like to see that come
9	to fruition before we do anything that might upset the apple
10	cart to put it colloquially.
11	CHAIRPERSON MITTEN: Thank you. I agree with
12	everything that?s been said so I?m not going to belabor it.
13	Can I have a motion?
14	COMMISSIONER PARSONS: Madam chair, I move that
15	we dismiss Application 16661 on the grounds that the Commission
16	cannot grant the relief requested.
17	VICE CHAIRPERSON HOOD: I?ll second.
18	CHAIRPERSON MITTEN: We have a motion and a
19	second. Is there any more discussion? All those in favor of
20	the motion please say aye.
21	(Chorus of Ayes.)
22	CHAIRPERSON MITTEN: Any opposed? Mr. Bastida
23	would you record the vote.
24	SECRETARY BASTIDA: Yes, madam chairperson. The
25	staff will record the vote 4-to-0 to dismiss the application,

1	Mr. Parsons moving, Mr. Hood seconding. Ms. Mitten and Mr.
2	Holman voting in the affirmative. Thank you.
3	CHAIRPERSON MITTEN: Thank you.
4	Now Mr. Bastida I believe there were no further
5	preliminary matters, is that correct?
6	SECRETARY BASTIDA: That is correct, Madam
7	chairperson.
8	CHAIRPERSON MITTEN: All those individuals
9	planning to testify in the remaining two cases, please stand
10	now to take the oath.
11	(Oath taken.)
12	CHAIRPERSON MITTEN: Mr. Bastida, would you call
13	the first case.
14	SECRETARY BASTIDA: Yes, Madam chairperson. The
15	first case of the evening is BZA Case No. 16674, application of
16	33 Patterson Limited Partnership pursuant to 11 DCMR Section
17	3104.1, for a special exception under paragraph 745 to use the
18	property as an electronic equipment facility to house an array
19	of telecommunications equipment. And under Section 2101 and
20	2201 for relief from the off-street parking and loading
21	requirements, to be operated in a C-3-C district at premises 33
22	Patterson Street, N.E., Square 672, Lot 255.
23	CHAIRPERSON MITTEN: Thank you, Mr. Bastida.
24	MR. EJTEMAI: Could I make an interruption. We
25	need from the Office of Planning to submit that map for the

1	record being made in an eight and a half by 14.
2	CHAIRPERSON MITTEN: No problem.
3	MR. EJTEMAI: Thank you.
4	CHAIRPERSON MITTEN: Now I think you can proceed,
5	Mr. Gell.
6	MR. GELL: Thank you very much, Madam chair,
7	members of the Commission. I am very pleased to represent 33
8	Patterson Street Limited Partnership which owns a building, a
9	building that?s been in place now for ten years, on Patterson
LO	Street which is a very small street. I think it?s 50 feet
L1	across.
L2	There are maps in your files and you?ll see that
L3	it?s just north of M Street and it?s between North Capitol
L4	Street and First, N.E.
L5	I think perhaps rather than say too much, Pm
L6	going to have Mr. Hossein Ejtemai present the case because he
L7	knows the property intimately, he?s one of the principals in 33
L8	Patterson Limited Partnership and I?ll have some things to add
L9	after that, but rather than have repetition I?m going to have
20	him read his statement and answer questions as well.
21	CHAIRPERSON MITTEN: All right. And just so that
22	you know Mr. Ejtemai, we have read the materials that you?ve
23	submitted. All right.
24	MR. EJTEMAI: Madam chair, members of the Zoning
25	Commission, my name is Hossein Ejtemai, part owner of 33

Patterson Street, N.E. In addition to knowing the property, I have some understanding of EEF since I have master?s degree both in engineering and computer science.

My partners and I purchased the building in 1994.

It was built over ten years ago as a fare, storage and maintenance warehouse when the area was zoned for warehouses.

The fare storage business dried up when Woodies, Garfinckels and other similar stores closed and went out of business.

Since that time we have tried very hard to rent the building for a warehouse, for office use and for any other authorized use. We got an offer from a tech hotel company to use the building for an electronic equipment facility I September of 2000. Before we could finalize the deal, the moratorium was put into effect. We believe that we will have a tenant very soon if we are granted this special exception.

The building has many features which make it an ideal site for an EEF. First, it is a secure building, the walls are thick and reinforced by steel rods, the building has no windows. Second, the air conditioning and heating are adequate and are in excellent condition, and the temperature can be kept at an ideal setting for the equipment.

For the next ten or 15 years, there are few things we can do with this building except use it as an EEF or regular warehouse. Given the cost of the property and the newness of the building, it would not be feasible to tear it

down and start again.

Second, the street is narrow and rarely used.

Third, the area will have a Metro some day but the neighborhood has yet to prove itself as an office and retail area.

Nearby are the warehouses, parking lots and institutions. On the west is a parking lot for the Department of Public and Assistance Housing. On the south is the United States Customs Department garage. Further south is the Department of Public and Assistance Housing are warehouse. On the east is D.C. Department of Education, a school bus lot. On the north is a vacant lot, the Hangar Prosthetics factory and the Veteran Affairs Community Clinic.

Perhaps 15 years from now when the Metro is established and other office and retail buildings have been built on the main thoroughfares, it will be financially feasible to build an office building on the side street. In the meantime, an EEF is an appropriate use.

The building has six parking spaces, which is sufficient for a warehouse or EEF. There are not likely to be more than three to five people on the premises at any time.

And much of the time is at night when street parking is plentiful. It has one loading dock.

Finally, unlike most of the applications previously considered and approved by the Zoning Commission, 33

or adaptation. It is ready to receive a tenant and is likely 2 3 to be on line sooner than other buildings in the area. If the building is used as an EEF, it will not 4 5 add to the traffic since only a small staff of two or three maintenance people is required to keep the equipment running. 6 7 Visitors will be limited to persons who have contracts with the facility and need to maintain their own equipment. Many of 8 9 their visits will occur at night when they can shut down their 10 services. Therefore, use of the building will be spread out 11 over a 24 hour period. It should be noted that Patterson Street is only 12 13 one block long -- North Capitol to First Street, N.E., and is only 50 feet wide. It is neither a major connecting road nor a 14 15 significant destination. Moreover, it is unlikely that any noise will 16 emanate from the building since there are no windows and EEF 17 activities are not known to produce noise or pollutants. 18 Finally, I did not realize that I bought the 19 20 building that we could be facing such a dire situation. need your help to save our investment. We think this can be 21 22 done without any ill effects either to the neighborhood or to the long term plans of the Office of Planning. 23 If you have any questions I?d be happy to answer. 24 25 CHAIRPERSON MITTEN: Thank you, Mr. Ejtemai.

Patterson is ready to go. The building requires no renovation

1	MR. GELL: If I could just add to that. I think
2	we?ve tried to show that some of the goals of the Office of
3	Planning to provide retail and so forth really are not
4	practical on this site at this time. And that since it is a
5	building that essentially needs no change whatsoever except on
6	the inside to accommodate whatever EEF facilities come in.
7	I think we can make the case that not only should
8	he get a special exception but it could be a very good
9	candidate for a variance, for use variance, since I think we
LO	can make out the case for hardship. That?s not necessary here
L1	but it is a very serious problem for us.
L2	I note that ANC-6A has submitted a letter
L3	supporting us. I don?t know that they weighed in on any of the
L4	other EEFs, but if they have in fact done so I?d be happy to
L5	give you a copy of that. I have extra copies here.
L6	CHAIRPERSON MITTEN: You have copies of a letter
L 7	from 6A?
L8	MR. GELL: I know it?s in the file. Yes, I do.
L9	
20	CHAIRPERSON MITTEN: If you would give us a copy
21	we would appreciate it because we don?t seem to have a copy of
22	it.
23	I?m sorry that we don?t seem to have your
24	materials, Mr. Gell. That?s the second time.
25	MR GELL: It?s perfectly all right And also the

1	Office of Planning has submitted its report supporting us.
2	CHAIRPERSON MITTEN: We actually have that.
3	MR. GELL: The only other thing, well I would add
4	one other thing. I notice that the Office of Planning had
5	suggested a condition relating to any security elements not
6	being outside. We have no problem with that. They say
7	security cameras are okay, but I saw no mention of lights, and
8	I assume lights could be a security element that would be
9	necessary to have to light up the parking lot. There may in
LO	fact be some lights there now. So I would simply make that
L1	alteration.
L2	With that I think we?ve shown that there?s no
L3	offense to the zone plan, certainly no effect on the
L <b>4</b>	neighborhood from traffic or noise or other emanations from the
L5	building. It?s going to be a very good neighbor on that block,
L6	and if you have any questions we?d be happy to answer them.
L 7	CHAIRPERSON MITTEN: Thank you, Mr. Gell. Any
L 8	questions for Mr. Gell?
L 9	COMMISSIONER HOLMAN: No, just an observation.
20	Cameras without lights may equal action. I?ll leave that there
21	I couldn?t resist.
22	MR. GELL: If there are no questions I would ask
23	
24	VICE CHAIRPERSON HOOD: I just have one brief
25	question. How long has the building been vacant?

1 MR. EJTEMAI: It?s been about five years. 2 VICE CHAIRPERSON HOOD: Five years? Thank you. 3 MR. GELL: And I would ask --4 MR. EJTEMAI: I?m sorry, six years. 5 MR. GELL: And I would ask for a bench decision if that?s possible tonight. 6 7 All right. CHAIRPERSON MITTEN: Thank you, Mr. 8 Gell. Can we hear from the Office of Planning briefly given 9 that we have read your report. 10 MS. STEINGASSER: Yes, ma?am, it?ll be very brief. 11 The Office of Planning reviewed this site in 12 13 terms of its existing zone being C-3-C. We recognize that the building was in the normal commercial area which has been 14 15 identified in the downtown action agenda as an area ripe for redevelopment and revitalization, especially in light of the 16 New York Avenue Metro. 17 We looked at the location of the building and its 18 19 design elements, or lack thereof, and it?s such an 20 uncharacteristically small building for both the existing and the potential use of the neighborhood and we didn?t believe 21 that its use as an EEF because of its location and odd size 22 would hinder the revitalization of the neighborhood. 23 We felt that the building also had restricted 24

opportunities because of its design and location and agreed

2	We didn?t feel there?s anything in the proposed
3	use or layout that would impede the pedestrian or vehicular
4	traffic. As explained by the applicant, it?s a 50-foot right
5	of way. It?s heavily parked on during the day, both sides of
6	the road. The site does have secured on site parking with six
7	spaces and, based on the employment figures we?ve seen, both
8	existing and planned facilities, that would be sufficient for
9	the amount of employees that would be at this facility.
10	We concluded that there was no significant
11	adverse impact and recommend approval.
12	CHAIRPERSON MITTEN: All right.
13	MS. STEINGASSER: And as an addendum, we have no
14	objection to the use of lights as a security element in the
15	outside. We were concerned more with structural type signs,
16	fencing, barbed wire and that kind of thing, but lighting still
17	counts.
18	MR. EJTEMAI: We already have a fence for the
19	parking.
20	MS. STEINGASSER: Right, that?s a fine, you know.
21	CHAIRPERSON MITTEN: And does that fence have
22	barbed wire across the top?
23	MR. EJTEMAI: No, it?s very it?s a fancy
24	fence, it?s not barbed wire fence, that?s right.
25	CHAIRPERSON MITTEN: Very good. Any questions

with the applicant?s case in that area.

1	for the Office of Planning? Do you have any questions for the
2	Office of Planning?
3	MR. EJTEMAI: No, Madam chair.
4	CHAIRPERSON MITTEN: Okay. Very good. Is there
5	anyone here representing ANC-6A?
6	VICE CHAIRPERSON HOOD: Let me just ask quickly
7	did ANC-6A they have a very lengthy letter and we just received
8	it, they supported you?
9	MR. GELL: Yes.
LO	CHAIRPERSON MITTEN: Very good. We have a letter
L1	in support from ANC-6A.
L2	I would just like to clarify something which is
L3	that the parking, and I think the Office of Planning had made
L4	reference in their report, that the parking is somehow
L5	grandfathered for this. And it?s actually not, so they need a
L6	variance on the parking.
L7	MS. STEINGASSER: That?s my understanding from
L8	the Corporation Counsel this evening, yes. I apologize for
L9	that.
20	CHAIRPERSON MITTEN: All right, I just want to be
21	clear about that.
22	VICE CHAIRPERSON HOOD: Madam chair, also the
23	letter from 6A is from the single member district commissioner,
24	I don?t know if it?s from the committee though, the whole
25	committee.

1 CHAIRPERSON MITTEN: Can you answer that for us, 2 Mr. Gell, just for the record. MR. GELL: Yes, I?ll be happy to. We went to the 3 4 ANC meeting and there was some general support but a number of 5 questions were raised. In the heat of trying to move on to other business, the Commission empowered Mr. Pernell, who?s the 6 7 single member, to hold another meeting with members of the community the following week. 8 9 And we went to that meeting, empowered them to 10 hold the meeting and then to write the letter based on what 11 happened at that meeting. But I think there was some general agreement that if there were not serious problems that it would 12 13 be sufficient for him to do so. And I think he explains that in the letter but 14 15 you?re right, it?s a long letter. CHAIRPERSON MITTEN: And it doesn?t -- it?s not a 16 letter that meets the requirement of our procedures for giving 17 it great weight but we will take it under consideration. And I 18 would just like to clarify my earlier statement which is we 19 20 have a letter from the single member district commissioner expressing support and also characterizing everything Mr. Gell 21 22 just said. Well, I would just suggest that it MR. GELL: 23 should be regarded as a little bit more than just his own 24

opinion since there was a specific vote to authorize him to

1	represent the commission, yes. Thank you.
2	CHAIRPERSON MITTEN: Very good. Any other
3	questions?
4	Well we have a request for a bench decision.
5	COMMISSIONER HOLMAN: Okay. If it?s timely and
6	appropriate, I move approval of application 16674 for 33
7	Patterson Street N.E., with the condition that all security
8	elements except for stereo, cameras and lights, be contained
9	within the building. And did I understand there needed to be
10	further additional parking in this motion?
11	CHAIRPERSON MITTEN: They need a variance from
12	the parking. They have six spaces and they would need eight.
13	COMMISSIONER HOLMAN: And a variance for the
14	appropriate eight spaces of parking.
15	CHAIRPERSON MITTEN: Very good. Can I get you to
16	
17	SECRETARY BASTIDA: Excuse me, madam chair. It
18	should be a special exception for the parking under the EEF
19	emergency rule is a special exception not a variance.
20	CHAIRPERSON MITTEN: All right. Thank you for
21	the clarification. And I neglected to ask if there?s anyone
22	here in support or opposition. Any person? All right.
23	COMMISSIONER PARSONS: Second.
24	CHAIRPERSON MITTEN: Thank you. We have a motion
25	and a second. One thing that I would like to have clarified is

1	that this special exception applies to the building as it is.
2	If it were expanded, you would need to come back. So just as
3	long as it?s clear that it?s this building at its current size
4	
5	So I would add that as a condition. Is that
6	acceptable, Mr. Holman?
7	COMMISSIONER HOLMAN: Absolutely.
8	CHAIRPERSON MITTEN: Any other discussion? All
9	those in favor please say aye.
10	(Chorus of ayes.)
11	CHAIRPERSON MITTEN: Any opposed? Mr. Bastida,
12	would you record the vote.
13	SECRETARY BASTIDA: Yes, madam chairman. The
14	Commission voted 4-to-0 to approve the project with conditions.
15	Mr. Holman moved and Mr. Parsons seconded it. Ms. Mitten and
16	Mr. Hood voted in the affirmative.
17	CHAIRPERSON MITTEN: Thank you.
18	SECRETARY BASTIDA: Do you want me to read the
19	conditions?
20	CHAIRPERSON MITTEN: I think it?s still fresh ir
21	our minds. Thank you, Mr. Ejtemai.
22	MR. EJTEMAI: Thank you, madam. By the way, you
23	pronounce my name very correctly.
24	CHAIRPERSON MITTEN: Mr. Bastida, would you call
25	the next case.

1	SECRETARY BASTIDA: Yes. The second case of the
2	evening is BZA No. 16691. It is an application of Jermar LLC,
3	pursuant to 11 DCMR subsection 3104.1, for a special exception
4	under Section 6802 to use the property as an electronic
5	equipment facility to house an array of telecommunications
6	equipment, and under subsections 2101 and 2201 for relief from
7	the off-street parking and loading requirements to be operated
8	in C-M-2 District at premises 705-707 Edgewood Street, N.E,
9	Square 3636, Lots 802, 803 and 810.
10	I would like to add that the applicant has just
11	submitted the posting, the affidavit of posting, and it seems
12	to be correct. Thank you.
13	CHAIRPERSON MITTEN: Thank you, Mr. Bastida. Ms.
14	Prince you can proceed.
15	MS. PRINCE: Good evening Chairman Mitten and
16	members of the Commission. I?m Allison Prince of Shaw Pittman
17	and I?m here tonight in connection with an application for the
18	approval of an EEF that would be in two existing warehouses
19	located at 705 and 707 Edgewood Street, N.E.
19 20	located at 705 and 707 Edgewood Street, N.E.  The application involves two existing warehouses
20	The application involves two existing warehouses
20	The application involves two existing warehouses that have been vacant for ten years. The properties have no

The proposed EEF use represents an immediate

1 opportunity to return these sites to a viable use. Both the city and the immediate community will benefit greatly from the 2 proposed use. 3 In connection with this application we met with 4 5 both Advisory Neighborhood Commission 5-3 and representatives of Edgewood Terrace, a large apartment complex located adjacent 6 7 to the subject site. Both Edgewood Terrace and ANC-5C support the application subject to certain conditions in the BZA order. 8 9 The conditions concern job training, a mentoring 10 program, general security issues and an ability to review final fence design surrounding the property. 11 We are pleased to agree to the 12 requested 13 conditions. We are aware of no opposition to the application. 14 15 The application meets all of the standards set 16 forth in the regulations. I?ve outlined that in great detail in the pre-hearing statement. Clearly, there?s no effect on 17 pedestrian traffic. The retail issue is a non-issue for these 18 lots that have no street frontage and all the other standards 19 20 have been satisfied. I should also add that when the 21 permanent 22 regulations are adopted, if they?re adopted as currently proposed, it is possible that special exception approval would 23 not be required for this use since the property is located in 24

the CM zone. That?s a question of how close the property is

from Metro. Under the regs, as finally proposed, because of the site?s distance from Metro we probably still would need special exception review but only because we missed the distance by 100 feet.

Nevertheless, in the interest of time, the applicant elected to proceed to allow his ability to implement his plans as soon as possible.

The proposed facilities will involve 30 parking spaces and three loading berths. The parking is existing. As requested in the previous case, we need a special exception regarding parking, the existing number of parking spaces is not adequate to satisfy the requirement under the emergency regulations and even the proposed regulations that will be considered at a hearing. We?re short a few spaces. Not many, I think seven. The loading is ample under the regulations.

As Mr. Gallagher will testify, the application meets all the standards and we, as I said, have proposed a set of conditions that address all of the issues raised by ANC-5C and Edgewood Terrace. We?ve entered into an actual memorandum of agreement with ANC-5C, I believe that?s part of the record. I have, it was just faxed to me today, I?m not sure that it?s made it into your files, a copy of the letter of support from the Edgewood Terrace Preservation Corporation which represents Edgewood Terrace. I have copies of that for the record.

I understand that the ANC?s materials are in the

record and I also prepared some conditions for inclusion in the order because the ANC?s memorandum of understanding is far more detailed than would be appropriate for inclusion in the order in its entirety.

I have with me tonight site plans, if those would be helpful to the Board. We have numerous photographs of the site for those of you who are unable to make it out there. But I will just really work on the basis that you can let us know what you need to see. We filed a lot of photographs in advance, there?s a site plan detailing exactly where the parking spaces are located on the property. That is in the record. And the loading berth location is located on that site plan.

If you have no questions, I can proceed with my only witness, Jerry Gallagher of Fowler, Flanagan Technology Partners, Inc. on behalf of the applicant.

CHAIRPERSON MITTEN: Please proceed.

MR. GALLAGHER: Good evening Chairman Mitten, members of the Commission. My name?s Jerry Gallagher, I?m the president of Fowler, Flanagan Technology Partners, and I?m here today on behalf of the applicant in Case No. 16691. We?re seeking special exception approval to allow the conversion of two existing warehouse buildings, 705 and 707 Edgewood Street, N.E., to EEF use. Both two story building have been vacant, as Allison said, for ten years, due to an inability for us to

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lease or sell them for typical warehouse use.

Over the past year or so, however, there?s a need that has developed in Washington for facilities to house electronic equipment, and both of these buildings have some of the characteristics required for this kind of use.

With certain improvements, the buildings will be ideal for EEF application. In the absence of the EEF opportunity, we think it?s very unlikely that the buildings would be occupied and that they would remain vacant.

As this Commission is aware, under the emergency regulations adopted in October of 2000 and amended November 17, EEF use is permitted on a subject site only with special exception approval. Under the proposed final regulations, EEF use would be permitted as a matter of right in the CM zone which is the classification of this property, as long as the site is more than 1,250 feet from a Metro station. The measured distance of the subject site from the closest Metro is approximately 1,000 feet so, as Allison said, we are just 100 feet approximately shy of that.

The pedestrian route, however, to the Metro station is significantly greater distance.

Before describing our plans for the building, please allow me to give you a little bit of background about our company and myself. Fowler, Flanagan Technology Partners was launched in 1999, in order to satisfy some of the demand

for mission critical environments in the telecommunications industry. We?re affiliated with Fowler Shore Flanagan, a company established eight years ago, performing similar development work for other occupancy types.

Since its inception in 1999, Fowler, Flanagan Technology Partners has become a leading owner and operator of telecom space in the country. We have over two million square feet of space that we own in ten cities.

Unlike the other nine properties that we own, however, the Edgewood technology center has a distinct advantage in the portfolio and this is because the Washington, D.C. area is my home. I was born and raised in Washington, D.C., as were my seven siblings. My parents were also born and raised in Washington and my grandparents lived here for 40 years. I worked in the city for many years while attending the University of Maryland and during my career as a design engineer and engineering manager.

These roots have carried forth in our developments plans for the property. In deciding what firms would help us develop the property, we?ve carefully selected local firms that are small. We?ve done this because we believe helping small companies grow is what we want to do and we want to put development dollars directly back into the community.

As our general contractor we have hired a hub zone certified small disadvantaged business and this company

has completed the demolition and some of the exterior spruce up of the buildings. This same contractor will be hired as our base building contractor for all of the upgrades, which will total several million dollars.

We?ve also hired a smaller architectural firm to handle the design work for us and the mechanical electrical engineering firm that will do all of our design is a small disadvantaged business and is also certified. We?re committed to using small local consultants and contractors for this effort and we will continue to do so throughout the course of the project. And as I am local to the project, I will keep a close eye on it myself and I will be personally involved in the management of all the upgrades and improvements.

As Ms. Prince explained, the properties are located in CM zone district, is located adjacent to railroad tracks and in the immediate vicinity of other warehouses and industrial buildings. The buildings have no street frontage, they?re accessible only from an alley off of Franklin Street, there is a residential complex to the west known as Edgewood Terrace Apartments. We have discussed the project in detail with representatives of Edgewood Terrace to ensure that our plans incorporate their input.

We?ve also appeared before Advisory Neighborhood Commission 5-C, which has no objections to the proposed EEF use subject to conditions that I will outline in a second.

The application meets all of the special standards set forth in 802A, the proposed use will not, as a consequence of its design or operation, low employee presence or proximity to other EEFs preclude future revitalization of the neighborhood, reduce the potential for vibrant streetscape, deplete street life or inhibit pedestrian or vehicular movement.

The conversion of the existing vacant warehouse to an EEF will not result in any undesirable consequences. To the contrary, the proposed use will greatly enhance the exterior appearance of the buildings. The proposed use will involve a significantly diminished amount of vehicular traffic to and from the site when compared to typical warehouse use. The proposed use does not include any retail use and, given the lack of street frontage, retail use would not be sustained.

The limited access to the site makes future retail or street activity very unlikely.

The building will not contain security or other elements that will impair street life or pedestrian flow. We have talked extensively with community representatives about security issues affecting the site and they?re pleased with the fencing and security measures associated with the proposed use and have asked for input in the final fence design which we have agreed to give them.

The proposed EEF will have substantial positive

economic benefits in the District of Columbia and surrounding neighborhood because the use will significantly increase the value of the property. In addition, the costly equipment in the buildings will result in some taxes. Further, the employees will generate income tax revenues.

In addition, the use will enhance the exterior appearance of the buildings and involve substantial capital investment in the city. The site is not located in accessible proximity to any existing or proposed Metro station, will have no effect on established pedestrian corridors, the nearest Metro station is Rhode Island Avenue and the pedestrian or vehicular route to get there is a considerable distance from the site. Given the distance, the Metrorail station would have no effect on the Commission?s view of the application.

There are a total of 30 parking spaces associated with the two buildings. All of the vacant area on the site is used for parking, therefore it would be difficult to locate new parking spaces on the site. Given the low intensity of the proposed use, 30 parking spaces will be adequate.

The applicant will provide loading consistent with the requirements of the regulations except that the loading berths are only 28 feet deep as opposed to the 30 feet required by the regulations, so that?s just a two foot shortfall in the loading berth depth.

A total of three berths will be provided along

1 with two serving delivery spaces. The applicant requests the required relief from 2 3 the Commission to provide less than the required amount of parking and to provide loading berths that fall slightly short 4 5 of the 30 foot requirement. As I mentioned in the course of our meetings with 6 7 the community, certain conditions were requested. Number one, we were asked to provide notice of job openings associated with 8 9 EEF use to ANC-5C and Edgewood Terrace, and we?re happy to do 10 that. Number two, the applicant was asked to seek to 11 establish a mentoring program with students from McKinley High 12 13 School which is planned to be a high tech high school, and we 14 are more than happy to do that. 15 And, finally, ANC-5C requested an opportunity to review the proposed fence design and, again, we?re happy to do 16 17 that. We?ve talked with ANC-5 and Edgewood Terrace 18 Association and endorsed their requested conditions. We would 19 20 appreciate your action on this application as soon as possible so that we can begin our work to revitalize the property. 21 22 Thank you. CHAIRPERSON MITTEN: Thank you, Mr. Gallagher. 23 MS. PRINCE: One item that Mr. Gallagher picked up 24

in his testimony that I misstated in my opening statement, and

1	that is that although we provide the required number of loading
2	berths, their existing berths they are short two feet, so we do
3	in fact need special exception relief on the loading as well as
4	the parking.
5	And that concludes our presentation.
6	CHAIRPERSON MITTEN: And are you interested in a
7	bench decision if that?s
8	MS. PRINCE: We would be very interested in a
9	bench decision.
LO	CHAIRPERSON MITTEN: Okay. Thank you. Any
L1	questions, commissioners?
L2	VICE CHAIRPERSON HOOD: Mr. Gallagher, just one
L3	quick question. I have a list in front of me of five
L4	conditions and you may have mentioned it, I may have beer
L5	reading while you mentioned. One of them, number four, says
L6	the applicant agrees to work closely and cooperatively with the
L7	ANC to address their problems concerning illegal dumping of
L8	bulk trash near the subject site.
L9	MR. GALLAGHER: Yes.
20	VICE CHAIRPERSON HOOD: So you agree to these
21	five that they have?
22	MR. GALLAGHER: Yes, sir we do. We?ve
23	experienced illegal dumping and have shown up in the site and
24	found illegal dumping had occurred the night before and have
25	removed it.

1	VICE CHAIRPERSON HOOD: And I?m trying to kind of
2	get a placement. Had you finished, I didn?t want to cut you
3	off. Okay. I?m trying to get a placement for where the site
4	is. If I cross the train, if I walk across the train tracks I
5	can see it from the tracks, right?
6	MR. GALLAGHER: You can?t see it from Rhode
7	Island Avenue, it?d be very hard to see.
8	VICE CHAIRPERSON HOOD: No, I mean if I?m on the
9	train. I can see it?
10	MR. GALLAGHER: Yes. If you were traveling north
11	on the train from Rhode Island Avenue and you looked
12	immediately to your left, you?d see it.
13	VICE CHAIRPERSON HOOD: Is this one of the
14	buildings with all the graffiti?
15	MR. GALLAGHER: Yes, we?ve painted over most of
16	it. Yes.
17	VICE CHAIRPERSON HOOD: All right. Thank you.
18	CHAIRPERSON MITTEN: Any other questions? Mr.
19	Barry, did you have any questions on cross examination for the
20	applicant? Very good. Ms. Steingasser, we?ll go to the Office
21	of Planning report now.
22	MS. STEINGASSER: Okay. I?ll keep this very
23	brief. The staff did look at the site at several different
24	occasions out in the field as well as the information provided,
25	and concluded that this was an appropriate use in the CM-2 zone

at this particular location. It has an unusual topography as it?s built into the side of the residential building from the west and this commercial property that comes up against it from the south. And it?s built in such a way that it?s not accessible to either one except for trouble people who are down there painting graffiti.

But it?s not accessible to the commercial facilities on its southern side and it sits off a dog-legged alley, the buildings have no public access, therefore it?s not going to hinder revitalization of the area in any way, and it actually does serve as a good buffer between the train tracks to the east and the residential facilities that they?re currently upgrading to the west. So the staff did conclude that the site was consistent and had no adverse effect and recommended approval.

MS. MCCARTHY: In fact, I think we would add this is a poster child for one of the reasons why we were trying to discourage EEF use in C-3-C areas of NOMA that was more suitable for office and push it up toward the CM zone because, as we looked at the CM areas along the tracks there are a number of vacant or really substandard warehouse properties, poor access, buffered from residential areas that would be perfect.

So, hopefully, the reg by making that a matter of right area will succeed in moving that economic development up

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1 along the tracks and still keep the NOMA area available for 2 more vibrant, more people intensive kinds of uses. 3 CHAIRPERSON MITTEN: Very good, thank you. Any questions for the Office of Planning? Do you have any 4 5 questions for the Office of Planning? MS. STEINGASSER: No questions. 6 7 CHAIRPERSON MITTEN: Mr. Barry, do you have any questions for the Office of Planing? Okay. Thank you. 8 9 Mr. Barry, I think we?re ready for your report 10 now. 11 MR. BARRY: Thank you. Chairperson Mitten and members of the Commission, ANC-5C met on February 20 at its 12 13 regular monthly meeting to consider application 16691. short we voted to unanimously approve the application, 14 15 recognizing the suitability of the buildings for such a use, 16 recognizing their proximity to the crucial fiber lines that run along the neighboring railroad tracks. And recognizing that an 17 infrastructure will be needed if our vision for a high 18 technology, influx of high technology firms and communications 19 20 companies is expected to come into that area. So we?re supportive of the application. 21 22 the things that we did do though is make out a memorandum of agreement with the applicants? representative and we have 23 signed the agreement and we hope to have its ten elements as a 24

part of your final order in this case.

1 CHAIRPERSON MITTEN: Very good. Any questions 2 for Mr. Barry? Questions from the applicant? 3 MS. PRINCE: I would simply add the conditions 4 are quite lengthy, Mr. Barry, I would appreciate the 5 opportunity when we submit a draft order if you and I could 6 whittle down the language. I took a stab at that but they?re 7 very, very lengthy and detailed conditions, some of which I think are inappropriate for inclusion in the order. But if we 8 9 could just have an opportunity to --MR. BARRY: Well I would just suggest that Mr. 10 Sullivan did edit them and did send this agreement to us. 11 PRINCE: Well we have a memorandum of 12 13 agreement. I think there are some that are not site specific and probably not appropriate for inclusion in the BZA order, 14 15 but that?s not a binding agreement. But I can work that out 16 with Mr. Barry, I?ll go along with whatever he wants to do. CHAIRPERSON MITTEN: Well, I think just for 17 clarification, Mr. Barry has asked that the ten items be 18 included as conditions. So maybe we could just sort it out a 19 20 little bit better for his satisfaction. VICE CHAIRPERSON HOOD: Let me -- madam chair, 21 22 can I just ask because I did not have this document earlier, I thought this was what was agreed upon. 23 MS. PRINCE: What I did was I condensed the 24 25 conditions, thinking that the idea was that we have a

1 memorandum of agreement but the actual -- it?s just a miscommunication. 2 3 VICE CHAIRPERSON HOOD: So in other words, it?s 4 really here. 5 MS. PRINCE: Mr. Barry, I?d be happy to go through with it you really briefly. I just condensed them. 6 7 MR. BARRY: Well, yes. I mean I guess the reason I indicate that was because we strengthened item 2 for example 8 9 which involves job opportunities. Mr. Gallagher I believe, 10 said that the owner would seek notify us about job openings. 11 Well, we went further to say that the owner agrees to interview for employment positions with the owner?s company all ANC-5 12 13 residents who are qualified for such positions, which in my mind is distinctly different than just sort of notifying us 14 15 that a position is available. 16 MS. PRINCE: Right. And that?s in my proposed Mr. Barry?s conditions are written in a very 17 conditions. conversational way that are not directly translatable to 18 19 conditions in a BZA order. For example, we appreciate the 20 applicant?s commitment to do the following, there?s a pattern in the neighborhood of this, hence the idea of using wrought 21 22 iron, they?re not written in the format of --MR. BARRY: Right. But perhaps Ms. Prince did 23 have the benefit of looking at Mr. Sullivan?s revision of the 24

e-mail I sent her with those conditions and that?s what the

1	content of the memorandum of agreement is something that came
2	form her firm that was drafted by her colleague. And it doesn?t
3	include that language.
4	MS. PRINCE: Oh it does not? Okay.
5	MR. BARRY: It includes the points but the
6	language is I thought refined to
7	MS. PRINCE: To the point where there are
8	appropriate okay that?s fine.
9	MR. BARRY: I can give you a copy of it if you
LO	like.
L1	MS. PRINCE: No, IPve seen it. I thought it
L2	needed to be condensed but I?m not
L 3	CHAIRPERSON MITTEN: Well, can I take one example
L4	of something that?s not in the proposed conditions from the
L 5	applicant that is in the memorandum of understanding just so
L 6	that we can flesh it out.
L 7	MS. PRINCE: Sure.
L 8	CHAIRPERSON MITTEN: Number 9, if the project
L 9	requires any digging up of the streets to lay cable or similar
20	equipment, the owner will repave the street at the earliest
21	available opportunity to minimize any disruption that might be
22	created for residents.
23	So I?m sure that Ms. Prince doesn?t want that
24	included because that?s so far reaching. It goes well beyond
2.5	the site

1 MS. PRINCE: It?s a public space matter. You can put it in but technically you don?t have jurisdiction over 2 3 that. CHAIRPERSON MITTEN: Do you understand why she 4 5 wouldn?t want it in and why it?s probably not appropriate for us to put it in, because it goes well beyond the site and it 6 7 has to do with, as she said, public space. But it doesn?t diminish at all the relationship that you have through this 8 9 memorandum of agreement. 10 MR. BARRY: Right. I guess I accept, yes, I 11 accept your interpretation. I guess I?m a little confused why was it a part of the agreement if it was something you couldn?t 12 13 do. MS. PRINCE: Well, for example, the owner agrees 14 15 to work with elected officials who sit on the ANC to address 16 neighborhood concerns regarding problem uses in the Edgewood community. It?s a very broad condition that goes well beyond 17 the scope of our property. We?re happy to do it, we?ve entered 18 into an agreement to that effect. It seems inappropriate for 19 20 inclusion but I really don?t want to belabor this and if that makes everything easier for everyone, we?ll just put it in. 21 22 And I?m sorry for the misunderstanding, Mr. Barry. VICE CHAIRPERSON HOOD: But you know, Ms. Prince, 23 I actually think, I don?t necessarily think that they plan for 24

the owner applicant to solve their problems, I think they want

1	him to be a part of the community. I think that?s what I?m
2	hearing.
3	MS. PRINCE: That?s fine. That?s fine.
4	CHAIRPERSON MITTEN: Thank you Mr. Barry.
5	You?re done, thank you. Thank you for waiting, too.
6	Now are there any persons in support of the
7	application? Any persons opposed to the application? Would
8	you like to make a closing statement?
9	MS. PRINCE: If you feel one is necessary.
10	CHAIRPERSON MITTEN: No, just giving you the
11	opportunity. I?m trying to follow these rules of procedure.
12	MS. PRINCE: I would simply ask for your
13	expedited consideration, preferably a bench decision and
14	summary order of this poster child application.
15	CHAIRPERSON MITTEN: All right. Thank you.
16	Well we have a request for a bench decision.
17	VICE CHAIRPERSON HOOD: Madam chair, I make a
18	motion that we approve application for 16691 for special
19	exception under the EEF rules.
20	CHAIRPERSON MITTEN: Does that include the
21	parking and the loading?
22	VICE CHAIRPERSON HOOD: Yes.
23	CHAIRPERSON MITTEN: And are there any conditions
24	that you would
25	VICE CHAIRPERSON HOOD: I guess we could add,

1 hopefully between the applicant and the ANC they can work out -2 3 MS. PRINCE: I?ll go along with Mr. Barry?s Anything that?s in the memorandum of agreement will 4 5 be a condition. VICE CHAIRPERSON HOOD: Also to incorporate in 6 7 that motion, madam chair, the memorandum of understanding. 8 COMMISSIONER HOLMAN: Second. 9 CHAIRPERSON MITTEN: Very good. I guess I would 10 just like to ask for a little bit of flexibility to the extent 11 that there might be something that?s truly beyond jurisdiction that would be edited out. 12 But capturing the 13 spirit as much as possible of what is in the memorandum of agreement, if that?s --14 15 VICE CHAIRPERSON HOOD: Yes, that?s suitable just 16 hopefully that the good faith effort, always says the good faith effort even though it?s not within our jurisdiction. 17 COMMISSIONER HOLMAN: And perhaps we could offer 18 the assistance of Mr. Bastida to do some artful editorial 19 because we wouldn?t want this to become a situation where it 20 would hold up the project that I think everyone wants to move 21 22 forward because the zoning administrator says what is this? So I think we?re all in the same spirit here. 23 CHAIRPERSON MITTEN: Absolutely. Very good. Any 24

other discussion? All those in favor please say aye.

1	(Chorus of Ayes.)
2	CHAIRPERSON MITTEN: Any opposed? Mr. Bastida,
3	would you record the vote.
4	SECRETARY BASTIDA: Yes, madam chairman. The
5	staff will record the vote 4-to-0 to approve Mr. Hood moving
6	and Mr. Holman seconding, Ms. Mitten and Mr. Parsons voting in
7	the affirmative. Thank you.
8	CHAIRPERSON MITTEN: Thank you, Mr. Bastida and
9	thank you Mr. Gallagher, good luck with it.
10	MS. PRINCE: Thank you very much.
11	CHAIRPERSON MITTEN: And thank you all for coming
12	tonight and I declare this public hearing closed.
13	(Whereupon the above-entitled proceeding went off
14	the record at 8:38 p.m.)
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